IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

No. .....

LURA VIRGINIA BICKEL LEE CARTER,
Petitioner,

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a corporation, and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner Lura Virginia Bickel Lee Carter (Mrs. Carter) respectfully petitions the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on rehearing June 23, 1971.

OPINION BELOW

The opinion on rehearing of the United States Court of Appeals for the Fifth Circuit, Rives, J., dissenting, is not yet reported and is reproduced in the appendix together with the judgment of the Court. The final judgment of the District Court is unreported. It is not an opinion and summarily denied petitioner the relief she sought. The only pertinent part is quoted in the Statement of the Case.

JURISDICTION

The original opinion of the Court of Appeals was filed on April 7, 1971, Rives, J., concurring in the result. Timely petitions for rehearing were filed by Mrs. Carter and by the United States. An opinion on rehearing was filed on June 23, 1971, Rives, J., dissenting, this opinion operating, *inter alia*, to deny the petition of Mrs. Carter for rehearing or certification of a question of law to the Supreme Court of Florida.[1]

STATEMENT OF THE CASE

The respondent The Connecticut Mutual Life Insurance Company (Connecticut Mutual), brought a mortgage foreclosure proceeding in the Circuit Court of Hernando County, Florida, against several parties including Mrs. Carter and the United States of America seeking foreclosure of a first mortgage on 1736 acres of real estate in rural areas of Pasco and Hernando Counties, Florida which encompassed a homestead and nearby citrus lands. The complaint joined Mrs. Carter as defendant as a joint obligor with her late husband on a mortgage note secured by the

1. Florida Appellate Rule 4.61; Section 25.031, Florida Statutes (reproduced in appendix); see also *Clay* v. *Sun Insurance Office*, 363 U.S. 207 (1960).

first mortgage. The complaint specified that it was maintained under Chapter 702, Florida Statutes,[2] and sought sale under Section 702.02, Florida Statutes (Supp. App. 18).[3]

The United States was joined as a defendant by virtue of a crop lien executed by the late husband of Mrs. Carter and herself encumbering the property; it removed the case to the United States District Court for the Middle District of Florida pursuant to Title 28, United States Code, Sections 1444 and 2410 (Supp. App. 1-3). Thereafter summary judgment of foreclosure was granted in favor of the Connecticut Mutual (App. 2-13).

Subsequently, a foreclosure sale was conducted by Special Master. Connecticut Mutual bid in the property for the indebtedness due it of $434,190.37, leaving unsatisfied the debt due to the United States of approximately $500,000. On December 22, 1969, the Special Master sought confirmation of the sale (Supp. App. 53-55). Mrs. Carter on December 29, 1969, filed objections to confirmation (App. 13-16) alleging that the bid was grossly disproportionate to the value of the property, that the Farmers Home Administration had appraised the property in excess of $1,000,000, that the advertising for sale was inadequate, that Mrs. Carter was informed by Connecticut Mutual that if she would pay $25,000 before the sale, Connecticut Mutual would seek a postponement of the sale and permit Mrs. Carter to have 90 additional days to pay up any arrearage, and that in reliance on said promise, Mrs. Carter offered the Special Master and to the attorney for Con-

2. Pertinent portions are set forth in an appendix to the petition.

3. Abbreviations utilized herein are "App." and "Supp. App." and refer to the printed appendix and supplemental appendix in the Court of Appeals.

necticut Mutual $25,000 prior to the actual sale, which offer of payment was declined.

The nature of the objections manifestly involved the taking of testimony or the hearing of evidence in some form. Moreover, a portion of the statutory foreclosure procedure, Section 702.02(5), Florida Statutes, utilized by Connecticut Mutual, expressly required these objections to be considered by the Court.

Instead, without any hearing of any nature on the motion to confirm or the objections, the District Court on January 7, 1970, confirmed the sale, observing (App. 17):

> "One of the defendants, Lura Bickel Lee Carter, has filed objections to confirmation of foreclosure sale. The Court has considered the motion and memorandum thereto, and notes that some of the arguments raised in the objections were previously considered by the Court in an adversary hearing."

The District Court, however, did not directly rule upon the objections. Mrs. Carter then appealed on the failure of the Court to grant her a hearing on her objections. The United States also appealed on the issue of whether its lien was superior to the portion of the claim of Connecticut Mutual representing attorney's fees.

During the course of the appellate proceedings, the United States exercised the statutory right of redemption, Title 28, United States Code, Section 2410(c) by paying Connecticut Mutual the full amount of its mortgage with interest, costs and attorneys' fees. The Court of Appeals originally held the redemption mooted the priority issue, holding at the same time that Mrs. Carter was not entitled to an evidentiary hearing on her objections and was only entitled to a remand for a credit of the amount the United States would have bid had it originally bid at the fore-

closure sale, i.e., the lesser of the investment of the United States or the estimated resale value, 7 CFR 1872.17(b)(3)(VI).

On petitions for rehearing by the United States and Mrs. Carter the Court of Appeals granted the petition of the United States and affirmed the District Court on the priority issue, but denied anew Mrs. Carter's right to a hearing, publishing an identical opinion, denying also a petition for certification to the Supreme Court of Florida. Despite the facts that Mrs. Carter alleged and offered in effect to prove a fair sale would realize payment of equity of her own in the property, and that the United States in its original brief (pages 23-25) did not oppose a new sale, the Court of Appeals *ex mero motu* held that no grounds existed for an evidentiary hearing. It then stated:

> ". . . the statute requires only that the court 'consider' the objections and we find an absence of any indication from the Florida courts that the term 'consider' must be defined to require the convening of a hearing."

In dissent Judge Rives observed:

> "My brothers say 'the statute [Florida Statutes, §702.02(5)] requires only that the court "consider" the objections and we find an absence of any indication from the Florida courts that the term "consider" must be defined to require the convening of a hearing.' . . . So far as I have found, the Florida courts have not had occasion to define 'consider' as used in that statute either way, that is, to require or not to require an evidentiary hearing. I would think that the necessity of a hearing would depend upon the nature of the objections.
>
> In this case, I submit that to meaningfully 'consider' the objections requires that the mortgagor be given an opportunity to prove the facts which she averred.

> The only court which can finally and authoritatively construe the Florida Statute is the Supreme Court of Florida. It seems to me that the ends of justice require us to grant the mortgagor's request that, pursuant to Rule 4.61, Florida Appellate Rules, and Section 25.031, Florida Statutes, we certify an appropriate question to the Supreme Court of Florida for its decision. My brothers decline so to do.
>
> For the reasons stated, I respectfully dissent as to both issues decided."

The effect of the remand is to permit Mrs. Carter to establish a value of her homestead and farm lands at least equal to the debt, and thus defeat a deficiency claim now being asserted by the United States. It denies her the right to establish by evidence that a fair sale price would provide payment of her equity, and collaterally fully reimburse the United States, i.e., the relief denied her could prejudice no other party.

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS MAY DISREGARD AN ESTABLISHED MEANS OF DETERMINING APPLICABLE FLORIDA LAW AND IN LIEU THEREOF FORMULATE BY ITS OWN DECISION A RULE DENYING PETITIONER DUE PROCESS THROUGH AN EVIDENTIARY HEARING ON THE RIGHT OF THE UNITED STATES TO EXTINGUISH HER EQUITY IN HER MORTGAGED HOMESTEAD AND ADJACENT PREMISES.

REASON FOR GRANTING THE WRIT

It is important with respect to administration of justice in the federal courts for this Court to declare that federal courts should avail themselves of easily available means of establishing definitive answers to controlling questions of state law.

Connecticut Mutual sought foreclosure proceedings under Chapter 702, Florida Statutes, and the Court below was necessarily governed by and ostensibly sought to follow the procedures set forth therein.[4]

Section 702.02(5), Florida Statutes, provides in part:

"Value of property.—The value of the property sold by the clerk[5] shall be conclusively presumed to be the amount bid therefor and for which the property was sold at the sale, *unless objection thereto shall be filed in the cause within ten days after the filing of the clerk's certificate of sale. If any objections to said value be filed within such ten day period, such objections shall be considered by the court*; . . ." (Emphasis supplied).

4. Subject, only to the right of redemption granted the United States by Title 28, United States Code, Section 2410.

5. In this case by agreement a Special Master was utilized.

The majority recognized in its opinion that there was an "absence" of Florida law requiring a hearing in circumstances such as were here present. It seemingly equated this with an indication that not having spoken, the courts of Florida would not interpret the applicable statutes to require such a hearing. Judge Rives in dissent accurately pointed out that the Supreme Court of Florida was the only tribunal "which can finally and authoritatively construe the Florida Statute" and "that the ends of justice require us to grant" Mrs. Carter's request that an appropriate question be certified to the Supreme Court of Florida for decision.[6]

This Court in *Clay* v. *Sun Insurance Office*, 363 U.S. 207 (1960), indicated in effect that controlling questions of Florida statutory law need not be decided by a Court of Appeals when on the basis of available materials it could not make a confident guess how the Supreme Court of Florida would construe a statute, and that instead it should properly invoke the Florida certification procedure. We do not read *Clay* as necessarily mandatory, but at the least to express the ordinary and typical procedures to be followed in cases such as the instant one.

In this instance the Court of Appeals made a guess, hardly confident in light of the admitted "absence" of authority, and denied Mrs. Carter a hearing and her final chance to recoup any equity in her homestead and farm.

It is submitted that this Court should now reexamine *Clay* and make it abundantly clear that a federal court in

6. Mrs. Carter first sought certification on petition for rehearing because no issue had been raised earlier as to a right *per se* to a hearing. Connecticut Mutual principally argued procedural defects and lack of good faith, whereas the United States originally had not opposed resale. Such petitions for certification at this time are proper, *Life Insurance Co. of Virginia* v. *Shifflet*, 370 F.2d 555 (5th Cir. 1967); *Green* v. *American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962).

the absence of compelling reasons to the contrary should not undertake to decide questions completely unsettled of Florida statutory law, *at least when a party specifically invokes the certification procedure.*[7]

A fair regard for reasonable demands of federalism and a concern for uniformity of decision of similar causes in state and federal tribunals dictate that the desire of Florida, both judicially and legislatively expressed, to provide authoritative answers to questions of interpretation of Florida law should not be ignored, at least for less than strongly persuasive reasons totally lacking here. Otherwise a valuable device which Florida has pioneered is severely restricted, and may ultimately be relegated to disuse.

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7. The best of all pragmatic reasons is that the federal court has often guessed wrong in cases where no party asked for certification. Compare, e.g., *American Agricultural & Chemical Co.* v. *Tampa Armature Works,* 315 F.2d 856 (5th Cir. 1963) with *Gulf Oil Corp.* v. *Atlantic Coast Line R.R. Co.,* 196 So.2d 456 (DCA Fla. 2nd 1967), *cert. den.* 201 So.2d 893 (Fla. 1967) and *Bello* v. *Union Trust Co.,* 267 F.2d 190 (5th Cir. 1959) with *Glasser* v. *Columbia Federal Savings & Loan Assn.,* 197 So.2d 6 (Fla. 1967). For a characteristically pungent portrayal of this problem see the opinion of Brown, J., in *Ford Motor Co.* v. *Mathis,* 322 F.2d 267, 269, fn. 1 (5th Cir. 1963).

CONCLUSION

This petition presents a substantial question, raising important issues relating to the decision of questions of state law by federal courts. The petition should be granted and the writ of certiorari issued.

Respectfully submitted,

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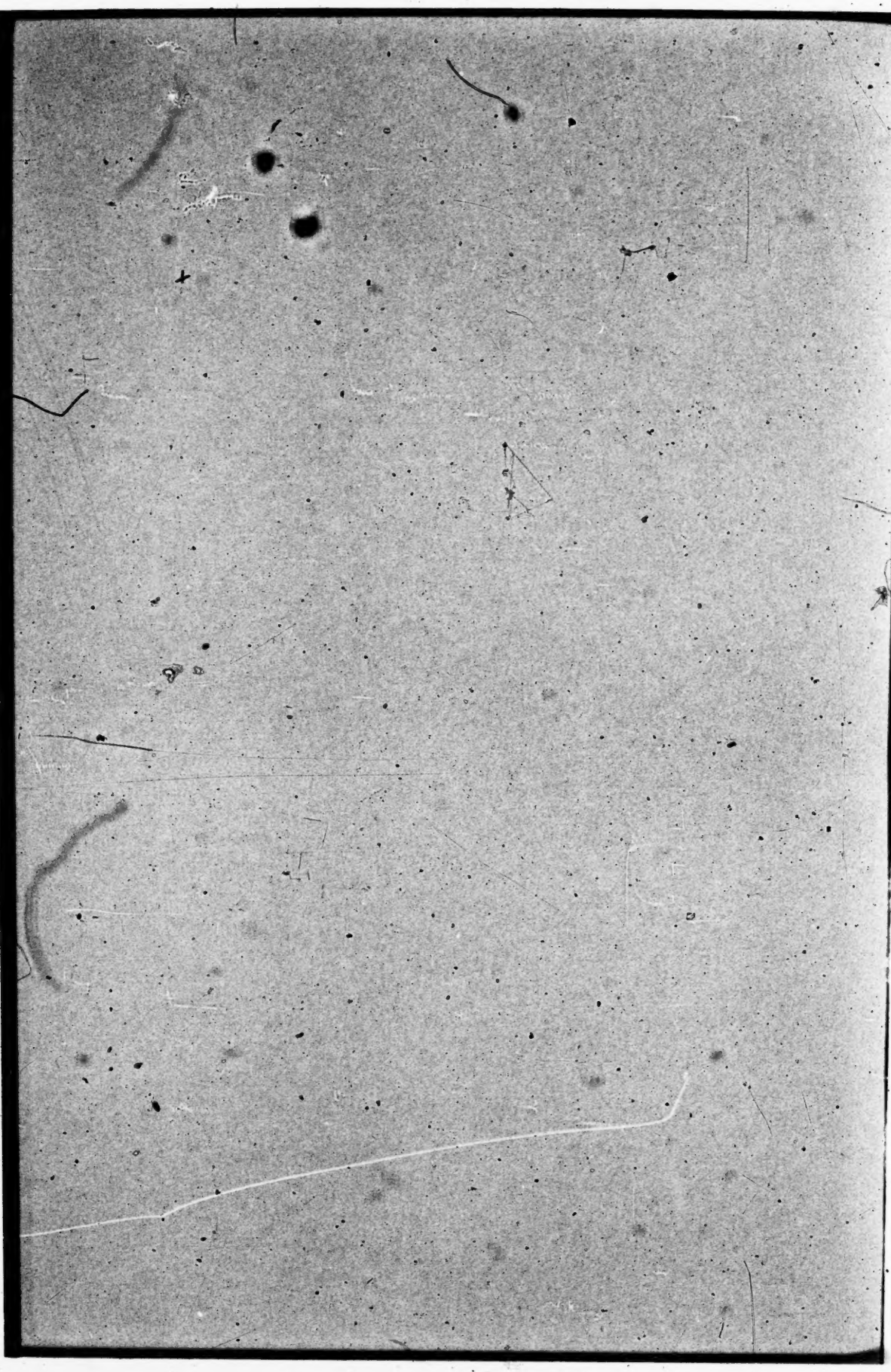

Opinion of Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29435

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Plaintiff-Appellee,

versus

LURA VIRGINIA BICKEL LEE CARTER, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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(June 23, 1971)

ON PETITION FOR REHEARING

Before RIVES, AINSWORTH and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: We originally decided this appeal on April 7, 1971, Slip Opinion No. 29,435. However, upon further consideration, we have decided to grant the government's petition for rehearing and withdraw our initial decision. The following opinion is substituted in lieu thereof:

In this three-party contest, the mortgagor seeks to set aside the entire foreclosure sale while the United

States, the second mortgagee, argues that its lien should come before the claim for attorneys' fees provided for in the first mortgage held by Connecticut Mutual Life Insurance Company. The district court held the second mortgage lien inferior to Connecticut Mutual's lien for attorneys' fees and confirmed the foreclosure sale despite the mortgagor's objections.

In January of 1962 Lura Virginia Bickel Lee Carter (mortgagor) mortgaged her Florida citrus farm property to Connecticut Mutual Life Insurance Company pursuant to an agreement which contained the standard provision for payment of attorneys' fees[1] by the mortgagor in the event of default on the underlying promissory note. A hard freeze occurred during the winter of 1962 severely damaging the mortgagor's citrus trees. Consequently, in July of 1963 the Farmers Home Administration (FHA), a branch of the federal government that extends agricultural credit when the need for such arises from a natural disaster, began lending the mortgagor sums of money secured by a second mortgage which also contained a provi-

1. The mortgage stated the following in regard to attorney's fees:

"To pay to (Connecticut Mutual) promptly upon demand all costs, expenses and attorney's fees, including the cost of any title examination, supplemental abstract of title or title insurance, that may be incurred by (Connecticut Mutual) in any proceedings, legal or otherwise, affecting the mortgaged property, or any part thereof, or the title thereto, or the validity or priority of this mortgage or that may be incurred by (Connecticut Mutual) by reason of the failure of the Mortgagor to keep and perform any of the covenants or agreements contained here or in said promissory note. All such costs, expenses and attorneys' fees paid by (Connecticut Mutual) shall bear interest from the date of payment at the rate of 8% per annum until repaid by Mortgagor and shall with such interest, be a part of the debt secured by this mortgage.

"This mortgage is intended by the parties to secure, and does and shall secure the payment, fully and completely, of any and all sums of money herein described. . . ."

sion for payment of attorneys' fees, and specifically stated that the second lien was subject to the mortgage held by Connecticut Mutual.[2]

When the mortgagor failed to meet the payments on the first mortgage, Connecticut Mutual initiated a foreclosure suit in the Florida state court in April, 1969. The action was removed to federal district court[3] where the trial judge granted foreclosure, and held that the mortgagor owed Connecticut Mutual $418,111.49 in principal and accrued interest and $11,500 as reasonable attorneys' fees. After the ensuing sale, at which the sole bidder, Connecticut Mutual, purchased the property for the approximate amount of the total indebtedness due it, the court held that, contrary to the contentions advanced by the government, the first mortgage lien for attorneys' fees was superior to the FHA second mortgage lien.

The court overruled without an adversary hearing the mortgagor's objections to the fairness of the sale.

The single disputed issue between the FHA and Connecticut Mutual involves the priority of the lien for attorneys' fees contained in the first mortgage. FHA contends its second mortgage is superior to Connecticut Mutual's lien for attorneys' fees because the amount of attorneys' fees was not choate (specific and certain) when the FHA mortgage attached in July of 1963. For authority, FHA relies principally upon three Supreme Court cases—*United States* v. *Equitable Life Assurance Society of the United States*, 1966, 384 U.S. 323; *United States* v. *Pioneer American Insurance Co.*, 1963, 374 U.S. 84; *United States* v. *New Britain, Connecticut*, 1953, 347 U.S. 81—which

2. FHA's mortgage expressly stated on its face that the second lien was "Subject to (sic) mortgage held by the Connecticut Mutual Life Insurance Company. . . ."

3. The case was removed to federal court because the United States was joined as a defendant by virtue of its status as second mortgagee. See 28 U.S.C. §§ 1444 and 2410.

hold that under the well-known rule of "first in time, first in right" a federal tax lien is superior to all other liens not choate at the time the federal tax lien is filed.

FHA quite correctly points out that the choate lien test, although originating in the tax lien field, has been extended to give federally-held mortgages priority over certain unrecorded liens which were admittedly superior under state law. *United States* v. *Roessling*, 5 Cir., 1960, 280 F. 2d 933; *United States* v. *Oswald and Hess*, 3 Cir., 1965, 345 F. 2d 836; *United States* v. *County of Iowa*, 7 Cir., 1961, 295 F. 2d 257. However, our research reveals no decision which would elevate a government mortgage to a position of superiority under the facts of the present case where the FHA, operating as a private lender, voluntarily took a second mortgage fully aware (see footnote 2, supra) of the then existent attorneys' fees clause in the first mortgage. Thus, finding an absence of binding legal precedent, we proceed to a consideration of whether congressional intent commands priority of the government's security interest in the instant set of circumstances.

As previously noted, the choate lien test, contended for by the government, emanated from three Supreme Court cases, supra, all of which were decided before the passage of the Federal Tax Lien Act of 1966 (P.L. 89-719), amending 26 U.S.C. §6323. The amendment substantially altered the priorities of federal tax liens so that a lien for attorneys' fees if valid under local law is no longer subordinate to a subsequently-filed federal tax lien.[4] Although the 1966 amendment does not of itself

4. In pertinent part, 26 U.S.C. §6323 provides as follows:

"(b) Even though notice of a lien imposed by section 6323 (federal tax lien) has been filed, such lien shall not be valid—

"(8) Attorneys' liens.—With respect to judgment. . . . as against an attorney who under local law holds a lien. . . ."

affect the priority of the claims here involved,[5] the statute diminishes the validity of the choate lien test in the important field of taxation where the doctrine originated. It would indeed be anomalous and contrary to our view of congressional intent to allow the FHA operating as a money-lending agency to prevail in a situation where the government as holder of a tax lien would have an inferior security interest. *Ault* v. *United States*, D. Alaska, 1968, 317 F. Supp. 373, (aff'd and opinion adopted) 9 Cir., 1970, 432 F. 2d 441; *Standard Savings and Loan Association* v. *Evans* (S. Carolina Spr. Ct., 1970, No. 19,135), ... S.E. 2d ..... The collection of taxes is certainly more vital to the government's existence than the making of farm loans and if Congress determines (as it has) that a federal tax lien, involuntarily imposed upon the government, is not unduly threatened by an inchoate lien for attorney's fees, then we see no reason to exempt a federal mortgage lien, which the government sought to obtain, from the operation of a provision for attorneys' fees in a first mortgage. By making farm loans, FHA became subject to the same requirements of local law which govern the validity of security interests in respect to all other lenders. The district court's order granting priority to Connecticut Mutual's lien for attorneys' fees over FHA's second mortgage is therefore affirmed.

The next issue we must deal with is mortgagor Carter's contention that the district court erred by failing to grant a hearing on her objections that the sale was unfair. Under Florida Statutes §702.02(5), the value of property sold at a foreclosure sale is conclusively presumed to be the amount bid at the sale unless objections are filed with-

5. See, for example *H. B. Agsten & Sons, Inc.* v. *Huntington Trust and Savings Bank*, 4 Cir., 1967, 388 F. 2d 156, cert. den. 390 U.S. 1025, where the court held that the Federal Tax Lien Act of 1966 did not by implication overrule the Federal Insolvency Statute, 31 U.S.C. 191.

in ten days in which case "such objections shall be *considered* by the court". (Emphasis supplied). After Mrs. Carter filed objections within the 10-day period, the district court stated that it had "considered the motion and memorandum thereto. . . ." and then entered an order confirming the sale. Mrs. Carter now asserts that under §702.02(5), supra, the court should have gone further and conducted a hearing to determine the validity of the objections. We cannot agree.

In the first instance, Mrs. Carter at no time requested the district court to hold a hearing. Secondly, the statute requires only that the court "consider" the objections and we find an absence of any indication from the Florida courts that the term "consider" must be defined to require the convening of a hearing. Finally, an examination of the specific objections raised by the mortgagor reveals that they were not of such a nature as would necessitate the taking of additional testimony or the hearing of evidence.

The mortgagor first alleged in her objections that the land should have been sold in parcels rather than en masse. Although this was perhaps the strongest of the objections, a review of the record discloses the mortgagor received a full-blown hearing on the parcel-en masse issue prior to the sale.

The mortgagor's second objection was that Connecticut Mutual promised to seek a 90-day postponement of the sale if the mortgagor would pay $25,000 before the sale, and that when the mortgagor offered the $25,000, Connecticut Mutual declined to accept payment. The offer by Connecticut Mutual was obviously unsupported by consideration, and the question of promissory estoppel did not arise since the mortgagor did not allege that she relied upon the promise to her detriment. Proving the factual

validity of the mortgagor's allegations at an evidentiary hearing would have been pointless since the objection, even if true, would not have been a ground for setting aside the sale.

Thirdly, the mortgagor objected that the sale price was inadequate. Under Florida law, mere inadequacy of purchase price, without more being alleged, is not a ground for setting aside a foreclosure sale, *Maule Industries* v. *Seminole Rock and Sand Company*, 1957, Fla., 91 So. 2d 307; *Dresser and Garfield, Inc.* v. *Teachers Insurance and Annuity Association of America*, 1967, Fla. App., 201 So. 2d 497, and this rule seems particularly applicable in the case at hand where the sum offered by any prospective bidder would inevitably be affected and reduced by the government's right to redeem the property within one year of the sale under 28 U.S.C. 2410(c).[6] The court was aware of the price bid at the sale, $434,000; of the maximum value alleged by the mortgagor, $1,000,000; and of the government's statutory right of redemption. Having these facts before it, the court was well equipped to "consider" the objection of inadequate purchase price without holding a hearing. The mortgagor simply failed to make allegations which, taken to be true, would justify voiding the sale under Florida law.

Lastly, the mortgagor challenged the advertising of the property as inadequate. A hearing was not necessary here because the district court could easily determine that the advertising complied with the statutory requirements. See Florida Statutes, §702.02(2).

Subsequent to oral argument, we were informed by counsel for the government that the United States, as

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6. ". . . . Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. . . ." 28 U.S.C. §2410(c).

junior lienor, exercised its statutory right of redemption under 28 U.S.C. §2410(c) by paying Connecticut Mutual $475,452.66, the full amount of the first mortgage together with attorneys' fees, court costs, and accrued interest. Having done so, the government presently has title to the realty, *Quinn Plumbing Co.* v. *New Miami Shores Corporation*, 1930, Fla., 129 So. 690, but, as conceded in the government's brief, Mrs. Carter's account must be credited with a sum equal to that which would have been credited her if the United States had bid at the foreclosure sale the amount that the Farmers Home Administration's regulations [7 C.F.R. 1872.17(b) (3) (vi)] required it to bid. We therefore remand the case to the district court with directions that the United States credit Mrs. Carter's account with an amount consistent with whatever sum the court determines the government would have bid at the foreclosure sale.[7] In this manner, the parties will be restored to the position they would have occupied had the government initially purchased the property from the foreclosure sale.

AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.

RIVES, Circuit Judge, dissenting:

When we originally decided this appeal, all three judges had thought that the exercise of the Government's statutory right of redemption rendered moot the issue of priority of liens. I now agree with my brothers that that

7. Although the government stated in its brief that it would have bid $900,000 at the foreclosure sale, it also stated that the maximum bid under the regulations, 7 C.F.R. 1872.-17(b) (3) (vi), is the lesser of gross investment or estimated resale value. Assuming, as the government contends, that the amount bid would have been estimated resale value, such a determination may require the hearing of evidence by the district court.

issue had not become moot, but, with all deference, I cannot agree with their present decision granting priority to Connecticut Mutual's inchoate lien for attorneys' fees over the lien of FHA's second mortgage. On the second issue as to the necessity for an evidentiary hearing on the mortgagor's objections to the confirmation of the foreclosure sale, I had thought that the Government's credit of the mortgagor's account with the amount which FHA should have bid at the foreclosure sale would probably be enough to satisfy the mortgagor and had, therefore, concurred in the result of the majority's decision. The mortgagor proved to be anything but satisfied. On the merits of that issue also, with all deference, I disagree with the majority's disposition.

In my opinion (1) the lien of FHA under its second mortgage is superior to Connecticut Mutual's lien for attorney's fees; and (2) the district court erred by failing to grant the mortgagor an evidentiary hearing on her objections to the confirmation of the foreclosure sale.

1. *Priority of Liens*

It seems to me settled law that prior to the Federal Tax Lien Act of 1966,[1] both federal tax liens[2] and federal mortgage liens[3] took priority over all competing liens

1. Pub.L. No. 89-719, 80 Stat. 1125, amending 26 U.S.C. 6323.

2. United States v. New Britain, 1954, 347 U.S. 81; United States v. Pioneer American Ins. Co., 1963, 374 U.S. 84; and United States v. Equitable Life Assur. Soc., 1966, 384 U.S. 323.

3. United States v. Roessling, 5 Cir. 1960, 280 F.2d 933, 935-936; Southwest Engine Co. v. United States, 10 Cir. 1960, 275 F.2d 106; United States v. County of Iowa, 7 Cir. 1961, 295 F.2d 257; W. T. Jones & Co. v. Foodco Realty, Inc., 4 Cir. 1963, 318 F.2d 881, 889, n. 19; United States v. Oswald and Hess Co., 3 Cir. 1965, 345 F.2d 886. The Supreme Court also in the *New Britain* case, *supra*, equated mortgage liens with statutory liens, 347 U.S. at 84.

except those which became "choate"[4] before the federal lien attached. The Federal Tax Lien Act of 1966 by its terms applies only to *tax* debts, and I submit that it does not impliedly change the rule in cases involving federal mortgage liens. Indeed the majority opinion concedes, as it must, that the statute "does not of itself affect the priority of the claims here involved." Instead, it casts FHA in the role of "a private lender" which "voluntarily took a second mortgage" with notice of the attorney's fee clause in the first mortgage and says that, "It would indeed be anomalous and contrary to our view of congressional intent to allow the FHA operating as a money-lending agency to prevail in a situation where the government as holder of a tax lien would have an inferior security interest."

I submit that FHA should not be cast in the role of a "private lender." A private lender is properly actuated by motives of profit, and is free to refuse to lend money on a second mortgage. By contrast, FHA lends money pursuant to a public policy mandated by Congress, for example, where (as in this case) a natural disaster has created a need for agricultural credit which cannot be met from other sources (7 U.S.C. §1961). In other instances, FHA makes loans to aid in the purchase and operation of family farms (7 U.S.C. §§1922-1923, 1941-1942); to help farmers in land and water development, use and conservation (7 U.S.C. §1924); and for other such purposes (see 7 U.S.C. §§1921-1991). The Congress provided that if credit is reasonably available from private sources FHA cannot make a loan (7 U.S.C. §§1922(4), 1941(4), 1961(a) (1), 1983(a), (c)).

---

4. That is certain as to lienor, liened property, and amount. United States v. New Britain, *supra*, 347 U.S. at 84; United States v. Pioneer American Ins. Co., *supra*, 374 U.S. at 89; United States v. Equitable Life Assur. Soc., *supra*, 384 U.S. at 327, 328. The last two of those decisions held specifically that an attorney's fee for foreclosing a first mortgage does not give rise to a "choate" lien until the amount of the fee has become certain.

This case furnishes a good illustration of the difference between FHA and a private lender. Connecticut Mutual lent the mortgagor $375,000 in January 1962. In the winter of 1962-63, the mortgaged citrus farm was damaged by a freeze. In 1963, FHA began to make emergency loans to the mortgagor even though her operation had been so damaged by the freeze that she was unable to meet the principal payment due to Connecticut Mutual at the beginning of 1964. She never made another principal payment (with the exception of $5,000 paid in 1969). When the first FHA loan was made the damage to the farm had occurred, but Connecticut Mutual's mortgage loan was not in default.[5] FHA continued making advances after there was a default.

It is because FHA and other government loans are made for public rather than commercial purposes that a special rule of priority applies to govern federal loans. The lien choateness test serves to limit the benefit that other lienors can receive from federal loans by providing that those liens which have not become certain as to identity of lienor, liened property, and amount of claim by the time the federal lien attaches must be subordinated to the federal claim in order that the financial aid which is the object of the federal loan will go either to the mortgagor or, if the loan fails, back to the Federal Government, and not to leave open the probability that a first mortgagee, which was not intended by Congress to be the beneficiary of federal financial assistance should be the true beneficiary through replenishment of its security.

With deference, I submit that my brothers tread upon the powers of Congress when they find that, "the col-

5. Under the standard laid down in *Equitable Life, supra,* 384 U.S. at 328, 329; "No liability [for attorneys' fees] having been incurred there could of course be no lien in existence at the time the federal lien matured."

lection of taxes is certainly more vital to the government's existence than the making of farm loans and if Congress determines (as it has) that a federal tax lien, involuntarily imposed upon the government, is not unduly threatened by an inchoate lien for attorneys' fees, then we see no reason to exempt a federal mortgage lien, which the government sought to obtain, from the operation of a provision for attorneys' fees in a first mortgage." (Majority opinion, p. 5.) That seems contrary to the reasoning of Judge Sobeloff in holding the 1966 Tax Lien Act inapplicable to the Federal Insolvency Statute, 31 U.S.C. §191:

> "The language and legislative history of the statute [1966 Tax Lien Act], however, convince us that Congress did not purpose to elevate inchoate mechanics' liens over federal contractual claims. The terms of the statute and the detailed Committee reports of both houses of Congress[4] speak repeatedly of subordinating federal unrecorded *tax* liens to mechanics' liens, never intimating a design to broaden the subordination to include other federal claims.
>
> * * * *
>
> "We cannot say that it is illogical for Congress to deem it desirable to retain a priority for money it loans, while relinquishing the priority for its tax liens, which represent no financial outlay. Whatever may be the merits of symmetry in these two quite distinct, if cognate, areas the argument seems more properly addressed to Congress than to this court.

"4. S. Rep. No. 1708, 89th Cong. 2d Sess. (1966); H.Rep. No. 1884, 89th Cong. 2d Sess. (1966), U.S. Code Cong. & Admin. News 1966, p. 3722."

H. B. Agsten & Sons, Inc. v. *Huntington Trust & Savings Bank*, 4 Cir. 1967, 388 F.2d 156, 160.

The revenues of the United States now rest upon a broad and certain tax base. Government taxes are so certain that the President is recommending to the Congress that the Government share its revenues with the States and municipalities. It is not irrational for Congress to think that the Government can afford to relax in favor of private liens the protection heretofore afforded liens for taxes, but that the strict protection should remain in force as applied to the limited and specific appropriations made by Congress to federal lending agencies. Such strict protection is all the more needed as against liens for attorneys' fees for foreclosing mortgages, for at least two reasons, (1) that the amounts of such fees are extremely elastic and (2) that such fees allowed in states where foreclosure is customarily effected by suit in court are much larger than the fees charged in states where the simpler method of foreclosure under power of sale is customary. In any event, Judge Sobeloff was correct in holding that such an argument is more properly addressed to Congress than to the courts. I decline to join in extending the Federal Tax Lien Act of 1966 to include FHA or other federal mortgage liens.

2. *Failure to Grant Hearing on Objections to Foreclosure Sale.*

It seems to me that the mortgagor did not have to expressly request a hearing on her objections to the confirmation of the foreclosure sale any more so than a party plaintiff or defendant has to expressly ask the court for a hearing before ruling on the merits of a law suit. The kind of hearing necessary depends upon the circumstances of the particular case. I quote three grounds of Mrs. Carter's timely filed objection:

"1) The only bid received in the aforesaid sale was that of The Connecticut Mutual Life Insurance

Company, holder of the first mortgage, which bid the property in for approximately $434,000.00. This bid price is grossly inadequate in proportion to the value of the property. Defendant is informed and believes that the Farmers Home Administration, the holder of the second mortgage for approximately $500,000.00 on said lands, had previously appraised the property at a value in excess of $1,000,000.00.

* * * *

"4) As a result of the inadequacy of the advertising, sale of the property en masse, and the sale in one county of property situated in two different counties, with the resulting gross inadequacy of price bid, the Defendant LURA VIRGINIA BICKEL LEE CARTER stands to suffer serious economic harm and is in jeopardy of having default judgment rendered against her in favor of the Farmers Home Administration, which holds a second mortgage on said lands, in the amount of $500,000.00, said second mortgagee having made no bid at the aforesaid sale.

"5) Defendant LURA VIRGINIA BICKEL LEE CARTER was informed by the Plaintiff that if she would pay $25,000.00 before the sale on December 18, 1969, the Plaintiff would seek a postponement of the sale and permit the said Defendant to have 90 additional days to pay up any arrearage with respect to Plaintiff's mortgage on said lands. In reliance on said promise, said Defendant offered to the Special Master and to the attorney for the Plaintiff to pay the sum of $25,000.00 prior to the actual sale, which offer of payment was declined and the sale was effected, beginning at 11:00 A.M., December 18, 1969." (App. 14, 15, 16.)

I submit that the mortgagor's objections raised genuine issues as to material facts upon which she was entitled to an evidentiary hearing prior to the sale. The record discloses that the district judge acted without

knowing[6] that the two parcels of land, one situated in Pasco County and the other in Hernando County, were at least eight miles apart.

My brothers say that, "'Under Florida law, mere inadequacy of purchase price, without more being alleged, is not a ground for setting aside a foreclosure sale.'" (Majority opinion, p. 7.) That may be true, but I submit that the Florida law is in line with that generally prevailing, that a judicial foreclosure sale will be set aside for such gross inadequacy of price as impeaches the fairness of the sale. In *Marsh* v. *Marsh,* Fla. 1916, 72 So. 638, 639, it was said:

> "In Macfarlane v. Macfarlane, *supra* [39 So. 995], following the prior holding in Lawyers' Co-operative Publishing Co. v. Bennett, *supra* [16 So. 185], and in line with the general rule established by the courts, we stated that, while mere inadequacy of price would not be sufficient to warrant the setting aside of a judicial sale—
>
> "'when such inadequacy is connected with or shown to result from any mistake, accident, surprise, misconduct, fraud, or irregularity, the sale will generally be set aside.'
>
> "We also referred with approval to the holding in Schroeder v. Young, 161 U.S. 334, 16 Sup. Ct. 512, 50 L.Ed. 721:
>
> "'While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transactions, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience.'"

---

6. "THE COURT: * * * * And I think if it is contiguous or closely contiguous, why it ought to be sold at one time.

"MR. McCLAIN [Mortgagor's Counsel]: Well, I was told differently." [App. p. 67.]

It now appears from the Government's exercise of its statutory right to redemption that Connecticut Mutual's successful bid of $434,000.00 was less than half of the value of the mortgaged property.

My brothers say that "the sum offered by any prospective bidder would inevitably be affected and reduced by the government's right to redeem the property within one year of the sale under 28 U.S.C. 2410 (c)." (Majority opinion, p. 7.) My brothers fail to note that the same statute also provides that in exercising its right of redemption the Government must pay interest "at 6 percent per annum from the date of such sale, and (3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used, by the purchaser) a reasonable rental value of such property." 28 U.S.C. §2410(d) (2) & (3). Those provisions might effectively prevent the Government's statutory right of redemption from chilling bids as apprehended by the majority.

My brothers say: "Lastly, the mortgagor challenged the advertising of the property as inadequate. A hearing was not necessary here because the district court could easily determine that the advertising complied with the statutory requirements. See Florida Statutes, §702.02(2)." (Majority opinion, p. 8.)

The mortgagor's objection did not go to any failure to give legal notice of the sale but to the need of additional advertising. [See ground 2 of the mortgagor's objection, App. p. 14.] In urging such a need prior to the sale, mortgagor's attorney had made that plain:

> "MR. McCLAIN [Mortgagor's attorney]: With any legal notice it is always this way. I mean if you just get a very cold notice that something is going to be

sold, it just does not normally, Your Honor, attract anybody to bid. And this is important property. It is strategically located. I don't think it takes any realtor to know this." (App. p. 60.)

My brothers say "the statute [Florida Statutes §702.02(5)] requires only that the court 'consider' the objections and we find an absence of any indication from the Florida courts that the term 'consider' must be defined to require the convening of a hearing." (Majority opinion, p. 6.) So far as I have found, the Florida courts have not had occasion to define "consider" as used in that statute either way, that is, to require or not to require an evidentiary hearing. I would think that the necessity of a hearing would depend upon the nature of the objections. In this case, I submit that to meaningfully "consider" the objections requires that the mortgagor be given an opportunity to prove the facts which she averred.

The only court which can finally and authoritatively construe the Florida Statute is the Supreme Court of Florida. It seems to me that the ends of justice require us to grant the mortgagor's request that, pursuant to Rule 4.61, Florida Appellate Rules, and Section 25.031, Florida Statutes, we certify an appropriate question to the Supreme Court of Florida for its decision. My brothers decline so to do.

For the reasons stated. I respectfully dissent as to both issues decided.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29435

D. C. Docket No. Civ. 69-219-T

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Plaintiff-Appellee,

versus

LURA VIRGINIA BICKEL LEE CARTER, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

---

Before RIVES, AINSWORTH and MORGAN, Circuit Judges.

Judgment on Petition for Rehearing

This cause came on to be heard on plaintiff-appellee's petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion and judgment originally entered by this Court on April 7, 1971 is withdrawn, and the judgment appealed from be, and the same is hereby affirmed in part; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court.

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 23, 1971

RIVES, Circuit Judge, dissenting:

Issued As Mandate:

Rule 4.61 Florida Appellate Rules

RULE 4.61. CERTIFIED QUESTIONS FROM FEDERAL COURTS

a. When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of law of this state to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

b. Jurisdiction. Questions or propositions of law referred to in sub-paragraph a hereof shall be certified for answer to the Supreme Court of this state.

c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph a hereof upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the clerk of the federal court and under its official seal.

The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said cause.

f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

g. Briefs and Argument. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within 30 days after the filing of said certificate in the appellate court of this state having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 20 days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within 10 days thereafter.

h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits.

Section 25.031, Florida Statutes

25.031 Supreme court authorized to receive and answer certificates as to state law from federal appellate courts.—The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and

there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

Section 702.02, Florida Statutes

702.02 Foreclosure procedure.—

(1) COMPLAINT.—In foreclosure, the original or a copy of the mortgage note and mortgage shall be attached to the complaint as a part thereof, and such attachment shall constitute averments of all of the contents of each instrument to the same extent as if fully set forth in the body of the complaint. If a copy of the mortgage note be contained in the mortgage, attachment of the mortgage alone shall be sufficient.

(2) SALE BY CLERK.—In any final decree of foreclosure, the court shall direct its clerk to sell the mortgaged property at public sale on the day specified in such final decree, which day shall be not less than ten nor more than thirty days after the date of such final decree, and upon the terms and conditions as provided in such final decree. Notice of such sale shall be published once only at least seven days prior to the sale in a newspaper circulated in the county where the sale is to be held. Such notice shall be concise and shall contain:

(a) A description of the property to be sold;

(b) The time and place of sale;

(c) A statement that the sale will be made pursuant to a final decree of foreclosure, and specifying the court

in which the cause be pending and the docket number of the case; and

(d) The name of the clerk making the sale. For his services in making such sale, the clerk shall receive a fee of ten dollars, to be assessed as cost.

(3) CERTIFICATION OF SALE.—After a sale of the mortgaged property, the clerk shall promptly complete and file in the proceeding a certificate of sale, which shall be substantially in the following form:

(Style of case) (Designation of court)

CERTIFICATE OF SALE

I, ..., Clerk of the above entitled Court, do hereby certify that pursuant to the directions of the Court in its Final Decree of Foreclosure entered herein, I gave notice of public sale of the mortgaged property described in said decree, by publishing same in ....., a newspaper circulated in ..... County, Florida, in the manner evidenced by Proof of Publication hereto attached, and on the ..... day of ....., 19....., offered said mortgaged property for sale at public outcry to the highest and best bidder for cash, and at such sale the highest and best bid received for said property was that submitted by ....., being a bid in the amount of $....., and I thereupon accepted such bid and sold said property to the said ....., and have retained the proceeds of such sale for distribution in accordance with the directions of said decree.

I have received my fee of ten dollars for making the sale, same being paid by .....

WITNESS my hand and the official seal of this Honorable Court, this ..... day of ....., 19.....

(SEAL) ....., Clerk

By .....
Deputy Clerk

If no objections to such sale be filed in the proceeding within ten days after the filing of such certificate of sale, the clerk shall thereupon complete and file in the proceeding a further certificate of title which shall be substantially in the following form:

(Style of case) (Designation of court)

CERTIFICATE OF TITLE

I, ..., Clerk of the above entitled Court, do hereby certify that heretofore, on the ..... day of ....., 19....., I executed and filed herein my Certificate of Sale of the mortgaged property, and that no objections to such sale have been filed herein on or before the date hereof, and that 10 days have elapsed since the filing of said Certificate of Sale.

That, as recited in said Certificate of Sale, the mortgaged property described as follows, to wit:

(Description)

was sold by me to ....., who now has title thereto.

WITNESS my hand and the official seal of this Honorable Court, this ..... day of ....., 19.....

(SEAL) ....., Clerk

By .....
Deputy Clerk

Upon the filing of the certificate of title, the sale shall stand confirmed as certified by the clerk and title to the mortgaged property shall pass fully and completely to the purchaser named in such certificate, without the necessity of any further proceedings or instruments. The certificates of the clerk provided herein shall be by him duly recorded in the chancery order book maintained by the clerk, and shall be duly indexed in the general index of the county under the name of the purchaser named in such certificate.

(4) DISBURSEMENT OF PROCEEDS OF SALE.— Upon the filing of a certificate of title, the clerk shall disburse the proceeds of the sale in accordance with the provisions of the final decree of foreclosure, and shall thereupon file in the proceeding a report of such disbursements, which report shall be substantially in the following form:

(Style of case) (Designation of court)

CERTIFICATE OF DISBURSEMENTS

I, ..., Clerk of the above entitled Court, do hereby certify that I have disbursed the proceeds received by me from the sale of the mortgaged property, as provided in the Final Decree of Foreclosure entered herein, to the persons and in the amounts, as follows:

Name	Amount
Total	

WITNESS my hand and the official seal of this Honorable Court, this ..... day of ....., 19.....

(SEAL)

....., Clerk

By .....
Deputy Clerk

If no objections to such report of disbursements be filed in the proceeding within ten days after the filing of the report, the disbursements by the clerk shall stand approved as reported. If any objections to the report of disbursements be filed within such ten day period, such objections shall be considered by the court; provided, however, that the filing of objections to the report of disbursements shall not in any manner affect or cloud the title of the purchaser at the sale to the mortgaged property.

(5) VALUE OF PROPERTY.—The value of the property sold by the clerk shall be conclusively presumed to be the amount bid therefor and for which the property was sold at the sale, unless objection thereto shall be filed in the cause within ten days after the filing of the clerk's certificate of sale. If any objections to said value be filed within such ten day period, such objections shall be considered by the court; provided, however, that the filing of objections to the value of the mortgaged property shall not in any manner affect or cloud the title of the purchaser at the sale to the mortgaged property. If no such objections be filed, the value as fixed herein shall have the same force and effect as if the court had decreed that the value of the said property was the amount bid and for which the property was sold at the foreclosure sale.

(6) The provisions of this section shall not apply to any suits pending at the time this act becomes a law.

Supreme Court, U.S.
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SEP 2 1971
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No. 71-166

In the Supreme Court of the United States

OCTOBER TERM, 1971

LURA VIRGINIA BICKEL LEE CARTER, PETITIONER

v.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, ET AL.,

and

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. This is an action by The Connecticut Mutual Life Insurance Company to foreclose a mortgage upon land owned by petitioner. The United States was named as a defendant because of a second mortgage held by the Farmers Home Administration. The district court granted foreclosure of both mortgages, and at the resulting foreclosure sale Connecticut Mutual purchased the property for $434,190.37—a sum somewhat in excess of the $418,111.49 in principal and interest due it. The district court confirmed the

443-239-71

sale over the petitioner's objections. Petitioner appealed, urging that the district court should have held a hearing on her objections.[1]

While the appeal was pending, the government, which had not bid at the foreclosure sale, exercised its statutory right of redemption under 28 U.S.C. 2410 and advised the court that it was willing to credit to petitioner's account $900,000—the sum it would have bid at the foreclosure sale under its regulation—less the amount actually bid by Connecticut Mutual.

The court of appeals affirmed the district court's confirmation of the sale. However, taking note of the government's redemption of the property, it remanded the case to the district court for a determination of the sum to be credited to petitioner's account. Petitioner unsuccessfully petitioned for rehearing or, in the alternative, for certification to the Florida Supreme Court under Section 25.031 of the Florida Statutes for a determination whether Section 702.02(5) of the Florida statutes requires a hearing on objections to a foreclosure. The instant petition requests this Court to order the court of appeals to employ Florida's certification procedure.

2. The petition presents no question warranting review by this Court. Whether to employ the Florida certification procedure when a question of state law bears on a case in the lower federal courts is a question

[1] The district court also held, over the government's objection, that the government's second mortgage lien was inferior to the first mortgagee's lien for attorneys fees. On the government's appeal, the court of appeals, after rehearing, affirmed.

within the discretion of those courts. In *Clay* v. *Sun Insurance Office*, 363 U.S. 207, this Court held that a court of appeals cannot avoid a state question where there are no controlling state precedents and, in that connection, suggested that on remand the court of appeals might want to employ the Florida certification procedure if it required the aid of the Florida courts in deciding the state issue. But nothing in *Clay*, as petitioner concedes (Pet. 8), suggests that employment of the certification procedure is mandatory.

The court below did not abuse its discretion. First, although the question whether Section 702.02(5) of the Florida Statutes requires a court to hold a hearing on a mortgagor's objections to a foreclosure sale has been at issue since the district court denied petitioner's objections, petitioner did not request certification of the question to the Florida Supreme Court until she filed her petition for rehearing in the court of appeals. Second, the court of appeals reasonably concluded that the objections raised by petitioner were not of a nature requiring a hearing for their resolution (Pet. App. A6). Finally, as the court of appeals pointed out, petitioner had not requested a hearing when she filed her objections in the district court (Pet. App. A6). Accordingly, the court of appeals was amply justified in not employing Florida's certification procedures.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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BRIEF FOR RESPONDENT, THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT, THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondent The Connecticut Mutual Life Insurance Company respectfully requests the Court to deny the Petition for a Writ of Certiorari of Petitioner Lura Virginia Bickel Lee Carter (Petitioner).

STATUTE INVOLVED

The statute involved is 28 U.S.C. 2001(a) which provides:

> "Any realty or interest therein sold under any order or decree of any court of the United States

shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. *Such sale shall be upon such terms and conditions as the court directs.*" (Emphasis added.)

QUESTION PRESENTED

Whether the Court of Appeals' Affirmance of the District Court's Confirmation of the Foreclosure Sale, and Its Method of Determining Florida Law, Should Be Reviewed by This Court.

ARGUMENT

I.

The District Court, in Confirming the Foreclosure Sale, Acted in Its Sound Discretion as Authorized by Federal Statute.

The terms and conditions of the foreclosure sale in the District Court are procedural matters controlled by federal rather than state law. While it is true that the action was originally brought under the Florida statute relating to foreclosures, the removal of the action by the Respondent United States of America to the federal court brought into play the federal procedure. Congress has provided such procedure in 28 U.S.C. 2001(a) (quoted in full above), which provides in part that *"such sale shall be upon such terms and conditions as the Court directs."* A broad discretion is thereby vested in the District Court:

> "It is a well settled rule that, except in case of abuse, appellate courts will not disturb the exercise of a district court's discretion in setting the terms and conditions for a judicial sale *and the confirmation thereof.*" (United States v.

Branch Coal Corp., 390 F. 2d 7 (3d Cir. 1968) (Emphasis added.))

The Court of Appeals found no abuse of discretion in the District Court's confirmation of the sale. As the Court of Appeals pointed out, no hearing was requested, and the objections raised to the sale could properly be determined by the District Court without further presentation. (Petitioner's Petition (hereafter referred to as Petition), p. A6)

Thus, the District Court overruled the objections, as it was authorized to do by 28 U.S.C. 2001(a). Furthermore, the Court of Appeals specifically considered such objections and determined that the lower court had reasonable basis for overruling the objections (Petition, pp. A6-A7). The objections therefore were afforded the consideration by the District Court that they deserve, and the lower court's action was properly reviewed by the Court of Appeals. No case is made for a further review by this Court, nor has an important question of federal law been raised.

II.

If Florida Law Is Applicable on a Procedural Question Regarding the Confirmation, the Court of Appeals' Method of Determining Such Law Was Reasonable.

The Court of Appeals by implication took the view in its opinion on rehearing that Florida law is controlling on the question of whether Petitioner was entitled to a hearing on the objections raised to confirmation of the sale (Petition, p. A6). Respondent respectfully suggests, as stated above, that this question is a procedural matter controlled by federal law, specifically in this case by 28 U.S.C. 2001(a) quoted above.

Even so, whether applicable or not, the requirements of Florida law were met. As stated in the Petition (p. 7), Section 702.02(5) of Florida Statutes requires the court to "consider" objections to confirmation. The District Court considered the objections, the Court of Appeals found that the District Court considered the objections, and in addition the Court of Appeals found a reasonable basis for the lower court's decision (Petition, pp. A6-A7). As the Court of Appeals viewed the matter, it saw no mandatory requirement for a further hearing or presentation in the word "consider" as that term is usually understood.

On the other hand, Petitioner strains the word's meaning in an attempt to create an ambiguity, and then bootstraps the ambiguity into a demand that the matter be certified to the Florida courts for further review. The certification procedure indeed is useful, as stated by this Court in *Clay* v. *Sun Ins. Office,* 363 U.S. 207 (1960), where the federal court cannot make a "confident guess" as to the Florida court's construction of its law (363 U.S., at 212). No such uncertainty exists here, however, for the Court of Appeals has made its determination that no hearing is required, and the silence of the Florida courts on the question evidences their disinclination to belabor the obvious.

Respondent respectfully submits therefore that, were Florida law applicable here, Petitioner has been afforded the same procedural rights required by that State for confirmation of a sale.

The decision of the Court of Appeals in so determining is manifestly a reasonably certain and supportable view of the Florida law, if applicable, and should be upheld.

CONCLUSION

The Petition for a Writ of Certiorari raises no important question of federal law, and should be denied.

Respectfully submitted,

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